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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HARDLINE ELECTRIC, INC., Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE ALLEN McGRATH
COUNSEL OF RECORD
STEPHEN CRANDALL HILLARD
AND MARY LEE POTEET
601 WEST 5TH AVENUE
SUITE 930
ANCHORAGE, ALASKA 99501
(907) 277-4564

QUESTIONS PRESENTED

1. Whether Republic Steel requires an employer to exhaust arbitral remedies under a collective bargaining agreement before seeking damages under 29 U.S.C. § 185 for a union's breach of contract.

2. Whether issuance of a Boys Markets injunction extinguishes an employer's right to damages under 29 U.S.C. § 185.

3. Whether the present suit constitutes enforcement of a prior arbitration award.

PARTIES

Hardline Electric, Inc.

International Brotherhood of Electrical Workers, Local 1547[1]

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[1]Only the union has been named as a respondent in this action. Prior to oral argument before the Ninth Circuit, the parties stipulated to the dismissal of all individual defendants other than Richard Warner. As to Mr. Warner, the Ninth Circuit reversed the District Court's award of $7,500.00 in costs against Mr. Warner for contempt of the preliminary injunction issued, and Hardline does not challenge that aspect of the Ninth Circuit's decision.

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Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of questions of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

U.S.C.A. § 1254

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire

record to be sent up for decision of the entire matter in controversy.

Petitioner Hardline Electric, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 29, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, Hardline Electric, Inc. v. International Brotherhood of Electrical Workers, Local 1547, No. 80-3270, slip. op. at 2780 (9th Cir. June 29, 1982) appears as Appendix A hereto. The findings of fact and conclusions of law of the District Court appear as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 29, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves a dispute between a labor union, Local 1547 of the International Brotherhood of Electrical Workers ("the union") and an electrical contracting firm, Hardline Electric, Inc. ("Hardline"). Hardline is an employer and the union is a labor organization within the meaning of the Labor Management Relations Act of 1947, as amended. The union represents employees in an industry affecting commerce as defined under the Labor Management Relations Act of 1947, as amended. The union and Hardline were parties to a collective bargaining agreement which was in effect at all relevant times. Jurisdiction of the District Court of Alaska, the court of first instance, was invoked under 29 U.S.C. § 185.

The dispute concerned the issue of crew sizes on line construction jobs in

Alaska. Despite the fact that the "management rights" clause of the collective bargaining agreement gave the employer the right to determine crew sizes, the union insisted upon the right to define crew sizes. Work stoppages resulted over this issue, and Hardline brought the instant action in federal court in the District of Alaska. Hardline sought, inter alia, an injunction and damages under 29 U.S.C. § 185 as a result of the union's work stoppages. A Boys Markets injunction was issued, enjoining the union from conducting further strike activity. After trial on the damage action, the District Court of Alaska entered judgment awarding Hardline $329,768 for breach of contract.

The Ninth Circuit Court of Appeals reversed the judgment of the District Court of Alaska. The Ninth Circuit held that even though neither Hardline nor the union ever requested arbitration on the dispute

involved in this case, Hardline was limited to the remedy of arbitration. In discussing Hardline's obligation to seek arbitration, the court stated:

> Section 301 of the LMRA, 29 U.S.C. § 185, confers jurisdiction on the district court over suits by or against labor organizations to enforce the terms of a collective bargaining agreement. However, where the collective bargaining agreement provides for mandatory arbitration of some or all of the issues in the dispute, exhaustion of the contractual remedies is normally required. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); see also Gateway Coal Co. v. UMW, 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974).

Appendix A-11; see also Appendix A-23, n. 3 ("Although parties to collective bargaining agreements are ordinarily held to their contractual agreement to arbitrate even absent a timely demand for arbitration, see Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965), . . .")

The Ninth Circuit rejected Hardline's argument that its action for damages was proper because the union waived its right to arbitration by not requesting it. The specific holding of the Ninth Circuit on this point, with which Hardline disagrees, is as follows:

> We next consider Hardline's contention that the Union waived its contractual right to arbitration by not moving for a stay pending arbitration early in the suit. We see no place for the doctrine of waiver on the facts of this case. Hardline sought and obtained an injunction against the Union's alleged strike activity on the basis that the dispute was arbitrable. The Norris-La Guardia Act, 29 U.S.C. §§ 101-115, denies federal courts jurisdiction to enter any injunction "in a case involving or growing out of a labor dispute," 29 U.S.C. § 101, except in certain narrowly defined circumstances, none of which apply to the present case. A court may, however, enjoin a strike pending arbitration when the issue underlying the strike is subject to mandatory grievance-and-arbitration provisions of a collective bargaining agreement. Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970). If the underlying dispute is not subject

to mandatory arbitration, no injunction may be entered. Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 96 S.Ct 3141, 49 L.Ed.2d 1022 (1976). The reason for this judicially-created exception is that the federal policy favoring arbitration could not be meaningfully advanced if parties were free to strike over arbitrable issues.

The injunction issued by the district court in this case recites the necessary finding that the dispute is arbitrable and enjoins the strike on that basis, citing Boys Markets. The parties were not ordered to arbitrate, however, and Hardline apparently did not attempt to pursue its grievance through arbitration. Hardline's president testified at trial that a grievance "might have been filed," but that no further action was taken.

Under these circumstances, Hardline is estopped to argue that the Union waived its right to arbitrate. Hardline invoked the jurisdiction of the federal court on the strength of its assertion that the dispute was arbitrable. It then did not even attempt to arbitrate, but took the matter directly to trial. It would vitiate the Norris-La Guardia Act, and condone an abuse of the federal courts, to allow Hardline to proceed with its damages action without first exhausting its arbitral remedies. The judgment for damages against the Union must therefore be reversed.

(Footnotes omitted.) Appendix A-14-17.

The Ninth Circuit also rejected Hardline's argument that it had a right to damages because it was enforcing a prior arbitration award. See Appendix A-12-14.

REASONS FOR GRANTING THE WRIT

1. AN EMPLOYER IS NOT REQUIRED TO EXHAUST ARBITRAL REMEDIES BEFORE SEEKING DAMAGES UNDER 29 U.S.C. § 185.

The Ninth Circuit in this case cited Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) for the proposition that an employer is required to exhaust its arbitral remedies under the collective bargaining agreement before seeking damages under 29 U.S.C. § 185 for the union's breach of contract. See Appendix A-23, n. 3. However, in applying the exhaustion of arbitral remedy principal contained in Republic Steel in this case, the Ninth Circuit demonstrated a fundamental misunderstanding of Republic Steel.

Republic Steel is inapposite here because it dealt exclusively with an individual union member's duty to attempt to use the contract grievance procedure agreed upon by the union and the employer as the mode of redress. Republic Steel merely holds that a union member may not circumvent a mandatory grievance procedure -- it does not require exhaustion of arbitral remedies as between the parties to the contract, the union and the employer.

On the contrary, it is clear that although the existence of a mandatory grievance procedure is an affirmative defense to an action for damages under 29 U.S.C. § 185, the right to arbitration is a contract right which, like any other contract right, may be waived. See Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado, 614 F.2d 698, 702 (10th Cir. 1980), cert. denied, 101 S.Ct. 85 (1980); Cornell &

Company, Inc. v. Barber & Ross Company, 360 F.2d 512, 513 (D.C. Cir. 1966); Morales Rivera v. Sea Land of Puerto Rico, Inc., 418 F.2d 725, 726 (1969); Burton-Dixie Corporation v. Timothy McCarthy Construction Company, Inc., 436 F.2d 405, 407 (5th Cir. 1971. See also Drake Bakeries v. Local 50, American Bakery Workers, 370 U.S. 254, 266-67 (1962) (the court's discussion of the waiver issue makes clear that had the union not timely requested arbitration, as was the situation in this case, its right to arbitration would have been waived and the employer's court action for damages would have been proper).

The possibility that one party may waive its contractual right to arbitration is fundamentally inconsistent with the Ninth Circuit's position that the other party must exhaust its remedy under the collective bargaining agreement. Indeed, it would be patently unfair in this case to

allow the union, which never asserted its right to arbitration and which lost at trial, to then go forward in arbitration for a second chance. Thus, while arbitration is the preferred method for resolution of labor disputes, such preference does not have the effect of completely obliterating both parties' right to seek damages under 29 U.S.C. § 185.

2. AN EMPLOYER'S ACTION FOR DAMAGES UNDER 29 U.S.C. § 185 IS NOT EXTINGUISHED BY THE ISSUANCE OF A BOYS MARKETS INJUNCTION.

Together Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) and Buffalo Forge v. United Steelworkers, 428 U.S. 397 (1976) stand for the proposition that, where the underlying dispute is arbitrable, an employer may obtain an injunction to prevent the union's breach of a no-strike provision of a collective bargaining agreement. Boys Markets held

that such an injunction did not violate the anti-injunction provisions of the Norris La-Guardia Act. However, neither Boys Markets nor later cases which interpret it nor any policy of labor law support the Ninth Circuit's position in this case, i.e., that an employer, once having obtained a Boys Markets injunction, is then barred from seeking damages in court and is limited to arbitration as its remedy. In fact, just the opposite is true: "Moreover, the court's injunction in such cases does not require the union to arbitrate but only that it refrain from striking and also requires that the employer arbitrate only if and when the union chooses to pursue that remedy." (emphasis added). Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining (1976) at 610. Therefore, contrary to the Ninth Circuit's position, the issuance of a Boys Markets injunction

neither requires an employer to arbitrate a dispute nor to exhaust its remedies under the collective bargaining agreement before seeking damages under 29 U.S.C. § 185.

3. HARDLINE'S SUIT FOR DAMAGES WAS PROPER BECAUSE HARDLINE SOUGHT ENFORCEMENT OF A PRIOR ARBITRATION AWARD.

Hardline also contended that it had a right to obtain damages in court because its action constituted enforcement of a prior arbitration award regarding the crew size issue. See San Francisco Electrical Contractor's Ass'n., Inc. v. International Brotherhood of Electrical Workers, Local 6, 577 F.2d 509 (9th Cir. 1978). Despite the fact that the union repeatedly admitted the applicability and binding nature of the prior award on the present dispute, and without any factual support in the record, the Ninth Circuit erroneously held that the

prior arbitration award involved different facts and was therefore inapplicable.

4. THIS CASE PRESENTS IMPORTANT ISSUES OF LABOR LAW WHICH REQUIRE THE DECISION OF THIS COURT.

This Court should grant the present petition in order to interpret two seminal cases in the area of labor law, Boys Markets and Republic Steel. The Ninth Circuit's erroneous application of these two cases has created a fundamental and radical departure from the established principles of labor law which govern all employers and unions involved in labor disputes. This Court's reversal of the Ninth Circuit's decision is necessary in order to prevent the decision from having the widespread precedential effect which it otherwise would have.

The Ninth Circuit held that Hardline could not seek damages under 29 U.S.C. § 185 because it had obtained a Boys

Markets injunction earlier in the case. The Ninth Circuit's decision was not based on the particular facts of this case, but rather was based on the principle that whenever any employer obtains a Boys Markets injunction, the right to seek damages in court for the union's breach of the collective bargaining agreement is extinguished. Indeed, under the Ninth Circuit's decision, arbitration would be required even if both parties desired to forego arbitration and instead proceed in court.

The Supreme Court should grant the present petition for certiorari in order to clarify that the consequences of a Boys Markets injunction are not those stated by the Ninth Circuit. The instant case will have an impact which is both widespread and fundamental in the area of labor law because of the number of Boys Markets injunctions issued and because of the

"absolute" nature of the rule enunciated by Ninth Circuit.

Additionally, the present petition should be granted in order to correct the Ninth Circuit's erroneous extension of the Republic Steel doctrine, which was limited to exhaustion of the arbitral process by individual union members, to disputes between unions and employers. This Court's decision on such an extension and indeed, perversion, of Republic Steel is required because of the importance of the case in the field of labor law and because the issue of the right to seek damages versus arbitration for breach of a collective bargaining agreement is a fundamental and often recurring issue in labor law.

5. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE ISSUES OF EXHAUSTION OF ARBITRAL REMEDIES AND WAIVER.

The Ninth Circuit's decision in this case creates a conflict among the circuit court of appeals because the Ninth Circuit stands alone in requiring the parties to a collective bargaining agreement to exhaust their remedies under the agreement before filing suit under 29 U.S.C. § 185. No other court of appeals has interpreted Republic Steel as requiring such a result. On the contrary, nearly all other courts of appeals and all those which have considered the issue have held that the contract right to arbitration may be waived. See Morales Rivera v. Sea Land of Puerto Rico, 418 F.2d 725 (1st Cir. 1969); Demsey & Associates v. S.S. Sea Star, 461 F.2d 1009 (2d Cir. 1972); Radiator Specialty Co. v. Cannon

Mills, 97 F.2d 318 (4th Cir. 1938); Burton-Dixie Corp. v. Timothy McCarthy Construction Company, Inc., 436 F.2d 405 (5th Cir. 1971); American Locomotive Co. v. Gyro Process Co., 185 F.2d 316 (6th Cir. 1950); E. T. Simonds Construction Company v. Local 1330 of Int. Hod Carriers, 315 F.2d 291 (7th Cir. 1963); Local 198, United Rubber, Cork, Linoleum & Plastic Workers of America v. Interco, Inc., 415 F.2d 1208 (8th Cir. 1969); Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado, 614 F.2d 698 (10th Cir. 1980), cert. denied, 449 U.S. 824 (1980); Cornell & Company, Inc. v. Barber & Ross Company, 360 F.2d 512 (D.C. Cir. 1966).

The possibility that one party may waive its right to arbitration is patently inconsistent with the notion that the other party must exhaust its arbitral remedies. Therefore, the Ninth Circuit's decision in this case creates a conflict among the

circuit court of appeals which requires a decision of this Court settling the issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
George Allen McGrath
Counsel of Record
Stephen Crandall Hillard
Mary Lee Poteet
601 West 5th Avenue
Suite 930
Anchorage, Alaska 99501
Counsel for Petitioner

September 23, 1982

APPENDIX A

HARDLINE ELECTRIC, INC.
Plaintiff-Appellee,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, Larrie Brown, Larry Daniels, Mike Fenwick, Kenneth Hightower, Al Larsen, David Meade, James Morgan, George Roberts, Lou Romero, Heinz Troska, Richard Warner, Don Wedge, and Alex Urritia, Defendants-Appellants.

No. 80-3270.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted August 19, 1981.

Decided June 29, 1982.

Employer brought suit under labor Management Relations Act against union and some of its members, seeking damages and injunction for violation of collective bargaining agreement arising out of alleged wildcat strike. The United States District Court for the District of Alaska, James A.

von der Heydt, J., issued injunction against further strike activity, awarded damages to employer, found union and one of its members in contempt and awarded costs to the employer, and defendants appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) present suit could not be construed as suit to enforce prior arbitration; (2) employer was estopped to argue that union waived its contractual right to arbitration by not moving for stay pending arbitration early in employer's action; and (3) injunction granted by district court was overbroad, given lack of factual support for its issuance.

Reversed and remanded.

1. **Labor Relations - 752**

Individual union members could not be held liable under Labor Management Relations Act for breach of no-strike agreement. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

2. **Labor Relations - 416**

Where collective bargaining agreement provides for mandatory arbitration of some or all issues in dispute, exhaustion of contractual remedies is normally required as prerequisite to action under Labor Management Relations Act; doubts as to whether dispute is arbitrable should be resolved in favor of arbitrability. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

3. **Labor Relations - 416**

Employer's action under Labor Management Relations Act seeking damages and injunction for violation of collective bargaining agreement was not one to enforce prior arbitration, as would excuse employer from exhausting contractual grievance and arbitration procedure mandated by collective bargaining agreement, where prior arbitration did not address questions of whether union members' refusal to accept a

job constituted work stoppage and, if so, whether union initiated or condoned work stoppage, and as to scope of union's duty under contract to combat wildcat strike if one, in fact, occurred. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

4. Labor Relations - 876

Although Norris-La Guardia Act denies federal courts jurisdiction to entertain any injunction "in a case involving or growing out of a labor dispute," except in certain narrowly defined circumstances, a court may enjoin strike pending arbitration when issue underlying strike is subject to mandatory grievance and arbitration provisions of collective bargaining agreement; if underlying dispute is not subject to mandatory arbitration, no injunction may be entered. Norris-La Guardia Act, § 1, 29 U.S.C.A. § 101.

5. **Labor Relations - 937**

In suit that requests injunction against wildcat strike, district court should consider whether union is responsible under common-law agency principles for work stoppage; that determination is made solely for purposes of determining propriety of injunction issued; after such injunction is issued and arbitration is ordered, final decision regarding union's responsibility is to be determined by arbitrator. Norris-La Guardia Act, § 1, 29 U.S.C.A. § 101.

6. **Estoppel - 63**

Employer was estopped to argue that union waived its contractual right to arbitration by not moving for stay pending arbitration early in employer's action under Labor Management Relations Act arising out of alleged wildcat strike, where employer invoked jurisdiction of federal court on strength of its assertion

that dispute was arbitrable, and then did not even attempt to arbitrate, but took matter directly to trial. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; Norris-La Guardia Act, § 1, 29 U.S.C.A. § 101.

7. Labor Relations - 949

Each restraint imposed by order enjoining strike pending arbitration must be grounded on finding by district court that activity restrained is proper subject for relief despite Norris-La Guardia Act. Norris-La Guardia Act, § 1, 29 U.S.C.A. § 101.

8. Labor Relations - 999

Injunction enjoining union from striking, from refusing to provide referrals to employer from the union hall, from refusing to dispatch employees and from "otherwise engaging in economic action" was overbroad, where there was no evidence in the record, other than contract

itself, to support finding that each issue covered by injunction was arbitrable. Norris-La Guardia Act, § 1, 29 U.S.C.A. § 101.

Appeal from the United States District Court for the District of Alaska

Before SKOPIL, FLETCHER, and FARRIS, Circuit Judges.

FLETCHER, Circuit Judge:

Hardline Electric (Hardline) brought suit under Section 301 of the Labor Management Relations Act, (LMRA) 29 U.S.C. § 185 (1976) against IBEW Local 1547 (Union) and some of its members, seeking damages and an injunction for violation of the collective bargaining agreement between the parties. The district court issued an injunction against further strike activity, and awarded damages to Hardline in the amount of $329,768. The court also found the

union and one of its members in contempt, and, after trial, awarded costs to Hardline. This court has jurisdiction under 28 U.S.C. § 1291 (1976). We reverse.

I.

FACTS

This suit arose out of an alleged wildcat strike by some union members against Hardline, an electrical contractor, in July and August of 1978. The Union and Hardline have a long-standing dispute over the composition of work crews required for safety in "single-phase hot line work," i.e., work on certain energized electrical transmission lines. Hardline contends that in the summer of 1978, the Union initiated or condoned a wildcat strike designed to force Hardline to adopt the Union's view that five-man crews are required. The Union denies that there was a strike. It contends that certain individual employees declined to accept jobs with Hardline

because they believed the work was not safe. The Union argues that it made every effort required by the contract to refer individuals to Hardline through the union hiring hall; it denies that the no-strike clause in the contract gave it either the obligation or the right to force the individuals involved to work for Hardline on the controversial three-man crews.

Hardline filed suit in August of 1978. It sought a temporary restraining order (TRO) against the alleged strike. The district court granted the TRO, and later a preliminary injunction, enjoining the Union from conducting any work stoppages, refusing to provide referrals to Hardline from the union hiring hall, refusing to dispatch employees to Willow and Palmer, Alaska, instructing members not to work for Hardline, and from engaging in other "economic action."

At the time it applied for the TRO, Hardline also filed a complaint seeking damages from the Union for profits lost as a result of the alleged work stoppage. The complaint was later amended to include various individual union members as defendants, and to seek contempt sanctions against the Union and its members for violation of the TRO and the preliminary injunction.

After trial on the damage action, the court made findings of fact and conclusions of law, and entered judgment awarding Hardline $329,768 for breach of contract, finding the Union and Richard Warner, a union member, in contempt, and awarding Hardline $7,500 for costs incurred in bringing the contempt action. The Union and its defendant members[1] appeal.

II

ANALYSIS

A. Hardline's Action for Damages.

The Union contends on this appeal that Hardline should have been foreclosed from pursuing its action for damages before it exhausted the contractual grievance and arbitration procedure mandated by the collective bargaining agreement.

Section 301 of the LMRA, 29 U.S.C. § 185, confers jurisdiction on the district court over suits by or against labor organizations to enforce the terms of a collective bargaining agreement. However, where the collective bargaining agreement provides for mandatory arbitration of some or all of the issues in the dispute, exhaustion of the contractual remedies is normally required. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); see also Gateway Coal Co. v. UMW, 414 U.S. 368, 94

S.Ct. 629, 38 L.Ed.2d 583 (1974). Doubts as to whether the dispute is arbitrable should be resolved in favor of arbitrability. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.d.2d 1409 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) (Steelworkers trilogy).

Hardline does not argue that the instant dispute would not have been arbitrable under the contract. It argues, however, that the Union waived its right to demand arbitration. Alternatively, Hardline argues that this suit is actually one to enforce a prior arbitration award.

The second argument is easily disposed of. The prior arbitration referred to occurred in March of 1978.

There the Union brought grievances seeking back pay and reinstatement for members who had refused to work for safety reasons, on three-man crews for three employers, including Hardline. The arbitrator ruled that the refusals were unjustified under the contract and denied the grievances.

It is apparent that Hardline could not seek damages in a suit to "enforce" this prior award. The arbitrator determined only that, in the fact situations presented to him, the employers had made an adequate determination that the work was safe, and that employees who refused to work on the jobs were not entitled to reinstatement and back pay.[2] Even assuming that this decision definitively determined the three-man crew issue for all jobs at all times, which we find unlikely, it would not dispose of the issues in this case. Even if the union members had no contract right to refuse to work on a three-man

crew, the question remains whether their refusal to accept a job constitutes a work stoppage and, if so, whether the Union initiated or condoned the work stoppage in 1978. There is also a question as to the scope of the Union's duty under the contract to combat a wildcat strike if one, in fact, occurred. The prior arbitration did not address this question. It would have to be arbitrated. See Jacksonville Maritime Ass'n v. International Longshoremen's Ass'n, 571 F.2d 319, 323-24 (5th Cir. 1978). The present suit, therefore, cannot be construed as a suit to enforce the prior arbitration.

We next consider Hardline's contention that the Union waived its contractual right to arbitration by not moving for a stay pending arbitration early in the suit. We see no place for the doctrine of waiver on the facts of this case.[3] Hardline sought and obtained an

injunction against the Union's alleged strike activity on the basis that the dispute was arbitrable. The Norris-La Guardia Act, 29 U.S.C. §§ 101-115, denies federal courts jurisdiction to enter any injunction "in a case involving or growing out of a labor dispute," 29 U.S.C. § 101, except in certain narrowly defined circumstances, none of which apply to the present case. A court may, however, enjoin a strike pending arbitration when the issue underlying the strike is subject to mandatory grievance-and-arbitration provisions of a collective bargaining agreement. Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970). If the underlying dispute is not subject to mandatory arbitration, no injunction may be entered. Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1002 (1976).[4] The reason for this judicially-created

exception is that the federal policy favoring arbitration could not be meaningfully advanced if parties were free to strike over arbitrable issues.

The injunction issued by the district court in this case recites the necessary finding that the dispute is arbitrable and enjoins the strike on that basis, citing Boys Markets. The parties were not ordered to arbitrate, however, and Hardline apparently did not attempt to pursue its grievance through arbitration. Hardline's president testified at trial that a grievance "might have been filed," but that no further action was taken.

Under these circumstances, Hardline is estopped to argue that the Union waived its right to arbitrate. Hardline invoked the jurisdiction of the federal court on the strength of its assertion that the dispute was arbitrable. It then did not even attempt to arbitrate, but took the

matter directly to trial. It would vitiate the Norris-La Guardia Act, and condone an abuse of the federal courts, to allow Hardline to proceed with its damages action without first exhausting its arbitral remedies. The judgment for damages against the Union must therefore be reversed.

B. Injunction and Contempt.

Hardline also obtained an award of costs against the Union for contempt, because the Union allegedly violated the injunction. The Union appeals the finding of contempt.

The injunction enjoined the Union from striking, from refusing to provide referrals to Hardline from the union hall, from refusing to refer employees from Anchorage to Palmer and Willow, and from "otherwise engaging in economic action." It is not clear what portion of the injunction the Union was found to have violated.

The scope of the Boys Markets exception to the Norris-La Guardia Act is very narrow, and the propriety of an injunction under Boys Markets depends on the presence of specific factual findings:

> [E]ach restraint imposed by a Boys Markets injunction must be grounded on a finding by the District Court that the activity restrained is a proper subject for relief despite the Norris-La Guardia Act.

Donovan Construction Co. v. Construction Laborers Union, Local 383, 533 F.2d 481, 485 (9th Cir. 1976). In this case, there is no evidence in the record, other than the contract itself, to support a finding that each issue covered by the injunction was arbitrable. No findings were made, and no testimony was taken on the issue of arbitrability.

> If the scope of the injunction is so broad as to enjoin union activity in situations that the court could not have found to be suitable for Boys Markets relief, because of the paucity of factual support for the necessary findings, the injunction crosses the

> jurisdictional boundary of the Norris-La Guardia Act.

Donovan, 533 F.2d at 485-86 (emphasis in original).

We conclude that the injunction granted by the District Court was overbroad, given the lack of factual support for its issuance. It is apparent to the court that enjoining the Union from "otherwise engaging in economic action" cannot be supported by evidence sufficient to satisfy the Boys Markets standards. The court could not find that all "economic action" was arbitrable under the contract.

III

CONCLUSION

For the reasons given above, we must vacate the injunction and reverse the award of costs against the Union. The case is remanded to the District Court to reconsider, if necessary, the propriety of issuing a new injunction against the Union.

The judgment against the individual defendants is vacated, for the reasons given in note 1, supra. The judgment for damages against the Union is reversed, and the case remanded for stay or dismissal pending arbitration.

REVERSED AND REMANDED.

FOOTNOTES

1 During the pendency of this case, the Supreme Court decided in Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981), that individual union members cannot be held liable under section 301 for breach of a no-strike agreement. Counsel for both parties therefore stipulated that the judgment against individual members in this action be vacated. We so order, infra.

2 The prior arbitration resolved a dispute between Hardline and the Union arising in October 1977 over a job "in the Riverdell Estates area." The parties disputed whether use of a three-person crew on that job was unsafe. An agent of Hardline had determined that use of a three-person crew would be safe on the job. The sole question presented to the

arbitrator was whether Hardline had breached the collective bargaining agreement by terminating the three-person crew which refused to perform the work. The arbitrator held that, where Hardline's general foreman had visited the jobsite and determined that a three-person crew would be safe, where a backhoe was available to lift the transformer up the pole, where all crew members were qualified journeymen linemen, where adequate safety equipment was available to the crew, and where the weather was not a factor to the crew's safety, Hardline did not breach the contract in insisting on a three-person crew. The arbitrator made clear that his decision turned upon "the absence of compelling evidence that performance of the job by a three-man crew would, in fact, have been unsafe."

In this case, the dispute arose a year later over a job on Willow Mine Road. The job did not consist merely of hanging transformers, as the prior job had, but also included changing insulators. The foreman of the crew might have acquiesced in hanging transformers with a three-person crew, but he considered doing the insulation with such a crew unsafe. Thus, the prior arbitration covered a different job at a different place and time with different duties.

3 Although parties to collective bargaining agreements are ordinarily held to their contractual agreement to arbitrate even absent a timely demand for arbitration, see Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), in some rare cases the public policy favoring labor arbitration is so outweighed by other considerations,

see California Trucking Ass'n v. Brotherhood of Teamsters, ___ F.2d ___ (9th Cir. 1981) (inordinate delay in raising arbitration issue before the court resulted in waiver), that the court will find a waiver.

4 In a suit such as this one that requests an injunction against a wildcat strike, the district court should consider whether the union is responsible under common law agency principles for the work stoppage. See Carbon Fuel Co. v. UMW, 444 U.S. 212, 216-17 (1979). That determination is made solely for purposes of determining the propriety of an injunction issued pursuant to Boys Markets. After such an injunction is issued and arbitration is ordered, the final decision regarding the union's responsibility is to be determined by the arbitrator. Jacksonville Maritime

Association v. International Longshoremen's Association, 571 F.2d at 323-24.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

HARDLINE ELECTRIC, INC.
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1547,
et al., Defendants.

No. A78-204 Civil

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact as to Liability

1. The plaintiff is a corporation organized and in good standing under the laws of the State of Alaska. It is engaged in the business of electrical contracting and is engaged in an industry affecting commerce as defined under the Labor Management Relations Act of 1947, as amended.

2. The defendant IBEW Local 1547 (hereinafter Local 1547) is an unincorporated labor organization.

3. The defendants* Larry Daniels, Kenneth Hightower, David Meade, Lou Romero, Richard Warner, and Alex Urritia are members of Local 1547.

4. The plaintiff and the defendant are parties to a collective bargaining agreement (hereinafter the Outside Agreement) which was in effect from March 1, 1977 until February 28, 1979 and which bound Local 1547 and the individual union members to its terms.

5. The Outside Agreement expressly provides at Section 3.17 that "[t]he union shall not be held responsible by the Employer for unauthorized or so-called 'wildcat' strikes, provided the Union uses every reasonable means to terminate the

---

*Certain named defendants (George Roberts, Mike Fenwick, Larrie Brown, Al Larsen, James Morgan, Heinz Troska and Don Wedge) were voluntarily dismissed on October 12, 1979.

strike and cause strikers to return to work".

6. The Outside Agreement expressly provides at Section 1.3 that "[t]here shall be no stoppage of work. . . because of . . . disputes over matters relating to this Agreement".

7. The Outside Agreement expressly provides at Section 1.8 that "[t]he parties . . . agree to accept the arbitrator's award as final and binding upon them".

8. The Outside Agreement expressly provides, in the so-called "management rights" clause at Section 2.10, that "[t]he Employer shall . . . have no restrictions except those specifically provided for in the collective bargaining agreement, in . . . deciding the number and kind of employees to properly perform the work".

9. On September 22, 1977, after negotiation of the management-rights clause

into the Outside Agreement, the plaintiff's bargaining representative issued a "NECAGRAM", defining, inter alia, a recommended crew size of three persons for single phase hot line work.

10. In response to the above NECAGRAM, the business agent of Local 1547 mailed to all shop stewards in Local 1547 a letter which disparaged the employer's right to determine crew sizes and described the NECAGRAM as best used for toilet paper. This letter was never withdrawn by Local 1547.

11. In September 1977, a major dispute arose between electrical contractors and Local 1547 regarding the right to determine crew sizes under the management-rights clause. This resulted in a comprehensive arbitration proceeding on March 22-24, 1978. Numerous witnesses were examined. Issues regarding the past practice and safety of three-man crews for

single phase hot line work were thoroughly presented and evaluated.

12. On June 16, 1978, Arbitrator Dorsey issued a lengthy opinion which conclusively defined the proper interpretation of the management rights clause as follows:

> On the question of "controlling" past practice in Alaska and under the Outside Agreement of the parties, the Arbitrator must agree with the argument of Mr. Joe Armstrong in his pre-hearing brief on this point:
>
> "Prior to the current Agreement, there was not a management rights clause. This clause was negotiated in exchange for some additional benefits."
>
> . . .
>
> "IBEW will probably argue that past practice dictates that four-man crews be used. However this argument should have no merit in view of the management rights clause. Had there been an ambiguity in who determines crew size, perhaps the IBEW argument could be considered. However there is no such ambiguity when the management rights clause states clearly that the Employer has 'no restrictions. . . in deciding the number or kind of employees to properly perform the work, . . .[except those specifically

provided for in the Collective Bargaining Agreement]". (Pages 2-4 of Association's Pre-Hearing Brief.)

. . .

In a situation such as this where a bona fide determination has been made on the jobsite by a general foreman that a three-man crew can perform the work in question safely, the Arbitrator will not step in and interfere in the absence of compelling evidence that performance of the job by a three-man crew would, in fact, have been unsafe.

13. The underlying purposes of the electrical contractor's insistence upon the right to use three-man crews under the Outside Agreement was so that they could remain competitive with the "in-house" crews of electrical utilities such as the Matanuska Electric Association (MEA). MEA had a collective bargaining agreement whereby Local 1547 allowed it to use three-man "in-house" crews for single phase hot line work.

14. In April 1978, the plaintiff bid the Willow Mine Road Conversion Job (here-

inafter the Willow job) with the owner, MEA. The bid price was determined on the basis of using three-man crews. The plaintiff was awarded the contract.

15. The Willow job consisted almost entirely of single phase hot line work.

16. The plaintiff had the most modern safety and protective equipment available at the Willow job site. This included insulated booms, hot sticks, barriers, radios, four-wheel drive vehicles, and access to helicopter and float plane evacuation facilities. During the Willow job the weather was good and there was extended summer daylight.

17. There were no safety problems at the Willow job site or with the use of three-man crews for single phase hot line work at the job.

18. There was no question but that the arbitrator's decision allowed the plaintiff the right to use three-man crews

on the Willow job.

19. After issuance of arbitrator Dorsey's opinion, a meeting was called by Local 1547 on July 6, 1978. Approximately one hundred members were present. The membership present at the meeting expressed substantial hostility to the arbitrator's decision. The secretary and chief executive officer of Local 1547, Ike Waldrop, did not attend the meeting. Union officials at the meeting did not affirmatively support the arbitrator's decision.

20. At the beginning of the Willow job, from July 6, 1978 until July 23, 1978, the linemen worked in three-man crews on single phase hot line work. The crews included defendants Terry Daniels, Larry Daniels, and Alex Urritia.

21. On July 7, 1978, Local 1547 officials visited the Willow job site and told the crews that the arbitrator had made a bad decision and that the union would

decide what to do about it when the "IO" man from the "International Office" of the IBEW arrived.

22. In July 1978, Ike Waldrop called the regional office of the IBEW in San Francisco and requested that Al Cauglin be sent up to evaluate the "three-man crew" issue.

23. On July 14, 1978, Al Cauglin, without prior consultation with the plaintiff, arrived at the Willow job site. At the job site he told the crews that the arbitrator had made a bad decision and that Local 1547 would be giving them further instructions.

24. On July 14, 1978, business representatives of Local 1547 and Al Cauglin met with the plaintiff's President, Jerry Marostica, and its Secretary-Treasurer and supervisor at the Willow job, William Elliott. Representatives from the electrical contractors' multi-employer

bargaining unit were present also. At this meeting, Al Cauglin castigated the arbitrator's decision, sought to negotiate over the three-man crew issue, and said that "the union takes and the employers' (sic) give". The Local 1547 officials present concurred in these adamant positions. No safety issue was raised by Al Cauglin or the Local 1547 officials.

25. Although several intermittent work stoppages had occurred during the preceding two weeks, beginning on July 15, 1978 the crews on the Willow job refused to work three-man crews for single phase hot line work. Defendants Larry Daniels, Terry Daniels and Alex Urritia were linemen on these crews. The crews, including these defendants refused to work pursuant to directions from Local 1547.

26. Despite repeated and continuous requests by the plaintiff for full crews after July 25, 1978, Local 1547 supplied

only sporadic referrals of unsuitable numbers at unsuitable work times such as 7:00 a.m. and 2:30 in the afternoon. On July 28, 1978, defendants Kenneth Hightower and Lou Romero were dispatched by Local 1547 and employed by the plaintiff but refused to work on a three-man crew for single phase hot line work. They refused on the basis of instructions from Local 1547.

27. On July 31, 1978, and as a direct result of the dispute with the plaintiff, Local 1547 arbitrarily and without notice changed the place to which its members were dispatched for the Willow job from the plaintiff's shop in Willow, Alaska to Anchorage, Alaska. This resulted in a totally unworkable dispatch arrangement at the Willow job. The purpose of this change in practice by Local 1547 was to further harass the plaintiff.

28. During the period of the work stoppages at the Willow job, all of the incumbent officers of Local 1547 were up for election. The "crew-size" issue and the ensuing court action were points of substantial membership discontent during the election process.

29. During July and August 1978, Local 1547 engaged in a concerted work stoppage against the plaintiff. This work stoppage, while never officially condoned or recognized by Local 1547 to anyone outside of its membership, was the manifestation of an express union goal of refusing to abide by the arbitrator's decision and of making an example of the plaintiff for insisting upon use of three-man crews.

30. To the extent any refusals to work for the plaintiff by members of Local 1547 were "unauthorized", they were still part of a concerted refusal to work by the

defendant's members. Local 1547 failed to perform its express duty under the Outside Agreement to use every reasonable means to terminate the strike and to cause strikers to return to work. This breach included, inter alia, failures to exercise plenary disciplinary powers, failure to hold meetings, failures to put up posters, failures to send out letters, failures to instruct members to work three-man crews, failure to direct newly-dispatched lineman (sic) to work three-man crews, failures to endorse or support the arbitrator's decision, failures to use best efforts to dispatch crews, failures to use best efforts to dispatch full crews, and failures to renounce prior disparagements of the arbitrator's decision.

31. The concerted refusal to work and work stoppage against the plaintiff was also a mass action by the membership of Local 1547, which was ratified, promoted

and condoned by the leadership of Local 1547.

32. The few efforts made by Local 1547 to meet its obligations under the Outside Agreement and the injunctions of the court were forseeably (sic) ineffective measures which amounted to nothing more than posturing to avoid subsequent liability or sanctions.

33. The Temporary Restraining Order and Preliminary Injunction issued by the court were met with substantial hostility by the membership of Local 1547.

34. Local 1547 defied the injunctions of this court by continuing to engage in concerted work stoppage after issuance of the TRO on August 9, 1978 and the preliminary injunction on August 17, 1978.

35. On August 18, 1978, defendant Richard Warner along with other members of Local 1547 defied the preliminary injunction by refusing to work three-man crews

for single-phase hot line work after having notice of the preliminary injunction through contact with the Local 1547 shop steward on the Willow job.

36. As a result of unexplained prior inconsistent statements and discrepancies in testimony between John Kobylus, Michael Moore, and Ike Waldrop, there exist questions as to the credibility of their testimony.

37. The business representatives of Local 1547, including Al Cauglin as its chosen representative, instigated, expressly condoned and actively encouraged the work stoppages against the plaintiff.

Findings of Fact As To Damages

38. The plaintiff attempted to mitigate the losses resulting from the work stoppages to the fullest practical extent. This included frequent meetings with union officials, accommodations with Local 1547 on the composition of three-man crews,

repeated and continuing requests for new crews, and the seeking of injunctive relief from this court. The plaintiff properly declined to go to Oregon and Washington to seek crews because it would have been too costly, of speculative benefit, and would have increased the plaintiff's vulnerability to further harassment by Local 1547 and further economic loss. Crew members from Oregon and Washington had already been pressured by Local 1547 into refusing to work three-man crews.

39. By August 20, 1978, the economics on the Willow Mine Road Job had been irretrievably lost and the plaintiff properly decided that it could go no further in terms of risking further loss. The Willow job was returned to MEA uncompleted.

40. The Willow job was a "hard-money" contract in which the contractor bore the risk of loss. The principal cost of

performance was the labor burden on the job. The actual profit on the Willow job, exclusive of overhead items, and despite the substantial interruption caused by both intermittent and sustained work stoppages, was 42.4%. The reasonable projected profit on the job, exclusive of items of overhead, was 60%.

41. As a result of the breaches of contract and actions in contempt by the defendants, the plaintiff suffered $21,948 in los[t] profit on the Willow job as of August 31, 1978.

42. The plaintiff incurred $4,500 in legal fees in combatting the illegal work stoppages of the defendants as of August 31, 1978.

43. The plaintiff incurred a managerial time burden directly attributable to dealing with the illegal work stoppages of the defendants. Compensated at normal rates, this resulted in $4,640 in

loss to the plaintiff as of August 31, 1978.

44. As a proximate result of the illegal work stoppages and related activities and failures to act by Local 1547, the refusal by Local 1547 to allow the use of three-man crews, and the selection of the plaintiff as the "sacrificial lamb" in the Matanuska-Susitna Valley, the plaintiff's principal customer elected to take all of its electrical contracting work in-house in 1979 and to perform it under the three-man crew provisions of its own contract with Local 1547. The plaintiff was no longer competitive because it could not use three-man crews and because of the stigma attached to the inability to perform the Willow job.

45. The loss of goodwill and market share suffered by the plaintiff in 1979 was forseeable (sic) by Local 1547 because it

was fully aware of the economics of competition in the Matanuska-Susitna Valley.

46. In 1978 the plaintiff has 1.1 million dollars in contracts as its market share in the Matanuska-Susitna Valley. In 1979 it had $50,000 dollars in contracts. There was at most a 40% drop in total work in the Valley in 1979. The average profit margin in 1978 was 44.8%. As a result of the plaintiff's loss of market share and goodwill in the Matanuska-Susitna Valley in 1979, it suffered in lost profits during that year. Defendants presented no substantial evidence to the contrary.

47. As of March 31, 1980, the plaintiff had incurred $7,500 in additional reasonable attorney's fees in prosecuting its contempt action in this court.

Conclusions of Law

1. This court has jurisdiction of the parties and of the subject matter under

29 U.S.C. §185 and the doctrine of pendent jurisdiction.

2. The plaintiff is an employer engaged in commerce as an industry affecting commerce within the meaning of the Labor-Management Relations Act.

3. The defendant Local 1547 is a labor organization within the meaning of the Labor-Management Relations Act.

4. The individual defendants were members of Local 1547.

5. Plaintiff and the defendants were bound by the terms of the Outside Agreement.

6. The arbitrator's decision has a precedential and binding effect upon the union. See, e.g., San Francisco Electrical Contractors Ass'n v. International Brotherhood of Electrical Workers, 577 F.2d 529 (9th Cir. 1978); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd, 91 S. Ct. 2186 (1971); see generally

F. Elkouri & E. Elkouri, How Arbitration Works 377 (1973); ("An award interpreting a collective bargaining agreement usually becomes a binding part of the agreement and will be applied thereafter").

7. The work stoppage which began after July 6, 1978 and continued until the plaintiff's Willow job shut down was a concerted act of Local 1547 in furtherance of an express union goal, for a union benefit, and pursuant to directions from Local 1547.

8. The above work stoppage constituted a violation of the Outside Agreement, section 1.3 (no work stoppage), section 1.8 (arbitration as final and binding), and section 3.17 (duty to every reasonable means to terminate strike and cause strikers to return to work). 29 U.S.C. 185. Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962), 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf

Navigation Co., 363 U.S. 574 (1960); Holly Sugar Corp. v. Distillery Workers Union, 412 F.2d 899 (9th Cir. 1969); Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327 (9th Cir. 1969); Airco Speer Carbon-Graphite v. Local 502, 479 F. Supp. 246 (W.D. Pa. 1979).

9. The concerted refusal by the members of Local 1547 to perform work for the plaintiff was a strike and work stoppage as defined by the Outside Agreement and 29 U.S.C. §142(2) and a breach of contract.

10. The defendant Local 1547 is responsible for the mass action of its members and is required to use all means necessary and available to it to ensure that its members abide by the terms of the collective bargaining agreement in effect between defendants and plaintiff. Wagner Electric Corp. v. Local 1104, Int. U. of E., R & M. W., 496 F.2d 954, 956 (8th Cir.

1974); Vulcan Materials Co. v. United Steelworkers of America, 430 F.2d 446, 455 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1970); Portland Web Pressmen's Union v. Oregonian Publishing Co., 188 F. Supp. 859, 866, (D. Ore.), aff'd on other grounds, 286 F.2d 4, (9th Cir. 1966), cert. denied, 266 U.S. 912 (1966).

11. As a proximate and forseeable (sic) result of the work staoppages, the plaintiff suffered recoverable damages totalling $329,768, of which $31,088 was incurred on or before August 31, 1978, $295,680 was incurred on or before December 31, 1979, and $7,500 was incurred on or before March 31, 1980.

12. The specific elements of damages are as follows:

Lost profit on Willow job	$21,948.00
Legal costs in combatting strike	4,500.00
Managerial costs in combatting strike	4,640.00

Lost profit in 1979	295,680.00
Attorney's fees in prosecuting case	7,500.00

13. It has been established by a preponderance of the evidence that the plaintiff suffered substantial damages in 1978 and 1979. The plaintiff will not be barred from recovery because the monetary amount of its damages, including lost profits, are not susceptible to exact proof or may be difficult to ascertain. Each of the above damages elements was established to a reasonable degree of certainty by the plaintiff. Hunt Foods, Inc. v. Phillips, 248 F.2d 23, 33 (9th Cir. 1957); Eazor Express, Inc. v. International Brotherhood of Teamsters, 520 F.2d 951 (3rd Cir. 1975); aff'g 357 F. Supp. 158 and 376 F. Supp 841 (W.D. Pa. 1974), overruled on other grounds, Carbon Fuel Co. v. United Mine Workers, 100 S. Ct. 410 (1979) (declining to adopt implied duty to terminate wildcat

strike where union had negotiated delation (sic) of express "best efforts" clause); Airco Speer Carbon-Graphite v. Local 502, Int'l Union of Electrical Workers, 479 F. Supp. 246 (W.D. Pa. 1979) (measure of damages established under express "best efforts" clause; where fact of damages established, amount of damages may be approximated on basis of reasonable inferences).

14. Defendant Local 1547 is liable to the plaintiff for the principal sum of $329,768 as a result of breaches of contract.

15. Defendants Larry Daniels, Terry Daniels, and Alex Urritia, along with other members of Local 1547, violated the Outside Agreement by engaging in a concerted work stoppage. This proximately resulted in a loss of profit on the Willow job of $21,948. These individuals (sic) defendants are jointly and severally

liable, with Local 1547, to the plaintiff for this principal amount. See Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562 (1976); Alloy Cast Steel Co. v. United Steel Workers, 429 F. Supp. 445, 451 (N.D. Ohio 1977); New York State United Teachers v. Thompson, Civ. Action No. 78-CV-141 (N.D. N.Y. Oct. 11, 1978) (opinion attached to plaintiff's Motion to Amend Complaint and Add Additional Defendants).

16. Defendants Local 1547 and defendant Richard Warner acted in contempt of the preliminary injunction issued by this court by engaging in a work stoppage with knowledge of the terms of that court order. See, e.g., Hutto v. Finney, 98 S. Ct. 2565 (1978) (affirming award of counsel's fees); Norman Bridge Drug Co. v. Banner, 527 F.2d 822 (5th Cir. 1976) (affirming compensatory fine for violation of injunctive order); Major v. Orthopedic Equipment Co., 410 F. Supp. 1250 (E.D. Va.

1976) (same).

17. Defendant Local 1547 acted in contempt of the Temporary Restraining Order issued by this court by engaging in a work stoppage.

18. Fixed overhead costs are not deducted from gross income in determining lost profit. See e.g., Edwin K. Williams & Co. v. Edwin K. Williams & Co. - East, F.2d 1053 (9th Cir. 1976), cert. denied, 433 U.S. 908 (1977); Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795 (3rd Cir. 1967); Resolute Ins. Co. v. Percy Jones Inc., 198 F.2d 359 (10th Cir. 1952); Cowington Bros. v. Valley Plastering, Inc., 93 Nev. 355, 566 P. 814 (1977).

19. Local 1547 is liable for the acts of its business agents and chosen representatives, including Al Cauglin, in instigating in and encouraging the illegal work stoppages in this case. Local 1547 is also liable by virtue of its subsequent

ratification of the acts of its agents. Wagner Electric Corp. v. Local 1104, 496 F.2d 954, 956 (8th Cir. 1974); Vulcan Materials Co. v. United Steelworkers of America, 430 F.2d 446, 456, cert. denied, 401 U.S. 963 (1971); Restatement (Second) of Agency, §8A.

20. The court finds that in light of the power of the court to enforce its injunctions and to punish contempt by the defendants, a compensatory award of $7,500.00 for legal costs incurred by the plaintiff in bringing this contempt action is reasonable and proper. Those defendants heretofore found to be in contempt of the orders of this court are jointly and severally liable to the plaintiff for this amount.

21. The plaintiff is entitled to post-judgment interest at the rate allowed by Alaska state law. 28 U.S.C. §1961.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED at Anchorage, Alaska, this 30th day of April, 1980.

/s/James A. von der Heydt
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

HARDLINE ELECTRIC, INC.
Plaintiff-Appellee,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, Larrie Brown, Larry Daniels, Mike Fenwick, Kenneth Hightower, Al Larsen, David Meade, James Morgan, George Roberts, Lou Romero, Heinz Troska, Richard Warner, Don Wedge, and Alex Urritia, Defendants-Appellants.

No. 80-3270.

DC CV 78-204 JAH

JUDGMENT

APPEAL from the United States District Court for the District of Alaska (Anchorage)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now

here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered June 29, 1982

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

HARDLINE ELECTRIC, INC.
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, Larrie Brown, Larry Daniels, Mike Fenwick, Kenneth Hightower, Al Larsen, David Meade, James Morgan, George Roberts, Lou Romero, Heinz Troska, Richard Warner, Don Wedge, and Alex Urritia, Defendants.

No. A78-204 Civ.

FINAL JUDGMENT

This action came on for trial before the court, Honorable James A. von de[r] Heydt, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff recover as follows:

From the International Brotherhood of Electrical Workers, Local 1547, the sum of $304,820.00;

From the International Brotherhood of Electrical Workers, Local 1547, Larry Daniels, Terry Daniels and Alex Urritia, jointly and severally, the sum of $21,948.00;

From the International Brotherhood of Electrical Workers, Local 1547, and Richard Warner, jointly and severally, the sum of $7,500.00.

It is further Ordered and Adjudged that the plaintiff shall recover from the above named defendants, jointly and severally, its costs in this action in the amount of $_____.

It is further Ordered and Adjudged that the plaintiff shall recover post-judgment interest on the above sums at the rate of eight per cent per annum as provided by law.

DATED at Anchorage, Alaska this 14th day of May, 1980.

/s/James A. von der Heydt
United States District Judge

Office - Supreme Court, U.S.
FILED
DEC 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARDLINE ELECTRIC, INC., *Petitioner,*

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION

M. GREGORY OCZKUS
International Brotherhood of
Electrical Workers
Local Union #1547
2702 Denali Street
Anchorage, Alaska 99503
(907) 272-6571
Attorney for Respondent

QUESTION PRESENTED

Should an employer have the right to sue a union for damages without first exhausting the mandatory grievance and arbitration procedure provided for in the collective bargaining agreement when an injunction was issued enjoining an alleged wildcat strike on the basis that the dispute was arbitrable?

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union #1547, opposes the petition of HARDLINE ELECTRIC, INC. for a writ of certiorari to review the opinion and judgment of the Ninth Circuit entered in this case, *Hardline Electric, Inc. v. IBEW L.U. #1547,* 680 F.2d 625 (9th Cir. 1982).

OPINIONS BELOW

The opinion of the Ninth Circuit, as well as the opinion, findings of fact and conclusions of law and judgment of the district court are adequately set forth and indexed in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

COUNTERSTATEMENT OF THE CASE

The primary issue in this appeal is the employer's right to sue the union for damages without first exhausting the contractual grievance and arbitration procedure mandated by the collective bargaining agreement. (A-11)[1]. The dispute arose out of an alleged wildcat strike against the employer by some members of the union. (A-8). The union denied there was a strike, contending that members declined to accept jobs with the employer, believing the work unsafe. (A-8,9).

The employer invoked jurisdiction of the federal courts asserting that the dispute was arbitrable. (A-16). The district court granted an injunction against further strike activity and at trial awarded damages to the employer. (A-7). During the pendency of this case in the Ninth Circuit, this Court decided *Complete Auto Transit, Inc. v. Reis,* 451 U.S. 401 (1981), and the judgment against individual members was vacated by stipulation of parties (A-21).

The employer did not argue the dispute would not have been arbitrable under the contract (A-12), but that the union had waived its right to arbitration (A-12). The Ninth Circuit found no waiver on the facts of the case, but did give an example when a waiver could be found (A-14; A-23, 24 n.3). The Ninth Circuit found that the strike was enjoined on the basis that the dispute was arbitrable, but that the parties had not been ordered to arbitrate by the district court (A-16).

The president of the employer company testified at trial that a grievance "might have been filed," but that no further action was taken (A-16). The Ninth Circuit held that the employer is estopped to argue that the union had waived its right to arbitrate (A-16). The Ninth Circuit held that "it would vitiate the Norris-La Guardia Act, and condone an abuse of the federal courts, to allow Hardline to proceed with its damages action without first exhausting its arbitral remedies." (A-17).

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[1] "A" references are to appendix A, "B" to appendix B.

The employer alternatively argued that: "this suit is actually one to enforce a prior arbitration award." (A-12). The Ninth Circuit found several questions remained that should have to be arbitrated (A-14). Among these were the scope of the union's duty to combat a wildcat strike and whether the union initiated or condoned the work stoppage (A-14). Another question was whether union members' refusal to accept a job would be a work stoppage (A-14). The Ninth Circuit examination of the prior arbitration revealed that it "covered a different job at a different place and time with different duties" (A-23), concluding that the present suit could not be construed as a suit to enforce the prior arbitration (A-14).

The Ninth Circuit vacated the injunction as overbroad, lacking factual support for its issuance, and remanded the case to the district court to reconsider the propriety of issuing a new injunction (A-19). The judgment for damages against the union was reversed, and the case remanded for stay or dismissal pending arbitration (A-20).

REASONS FOR DENYING THE WRIT

There are three basic reasons for denying certiorari in this case. First, petitioner has incorrectly stated the facts of the case, has distorted the holding of the Ninth Circuit, and has failed to demonstrate that the employer has been deprived of any right by the Appellate decision. Thus, petitioner has not shown a sound basis upon which certiorari can be granted. Second, the Ninth Circuit correctly decided this case and did so by way of reasoned application of this Court's prior federal labor law decisions. Third, the alleged conflict between the decision herein and the decisions of other courts of appeals is, upon analysis, not a true conflict that merits resolution by this Court. For these reasons, the Court should deny certiorari in this case.

I. PETITIONER HAS INCORRECTLY STATED THE CASE.

In its petition for writ of certiorari, the employer asserts that, "the Ninth Circuit held that even though neither Hardline (employer) nor the union ever requested arbitration on the dispute involved in this case, Hardline (employer) was limited to the remedy of arbitration." Petition at 3, 4. Such a claim distorts the Ninth Circuit's holding in this case. The employer invoked federal jurisdiction on its assertion the dispute was arbitrable. *See* App. A-16. The Ninth Circuit did not hold that the employer was limited to the remedy of arbitration. What the Ninth Circuit held was that: "It would vitiate the Norris-LaGuardia Act, and condone an abuse of the federal courts, to allow Hardline to proceed with its damages action without first exhausting its arbitral remedies." App. A-17.

Despite the clarity of the opinion below, petitioner has misunderstood. Petitioner's analysis would mislead this Court into believing the Ninth Circuit did not follow this Court's decision in *Republic Steel v. Maddox*, 379 U.S. 650 (1965). The Ninth Circuit cited *Republic Steel* for the proposition that exhaustion of contractual remedies is *normally* required. App. A-11. (Emphasis added.) Petitioner ignores the Ninth Circuit's citation and analysis of *Republic Steel*. Instead, petitioner chooses to argue that *Republic Steel* was cited for the proposition that an employer is required to exhaust its arbitral remedies before seeking damages under 29 U.S.C.§ 185 for an alleged breach of contract by a union. Petition at 7. To support its theory the petitioner refers to dicta in a footnote the court used in explaining why the facts of this case would not support a waiver of arbitration. *See* App. A-14. *See also* App. A-23,24. n.3 (Explanation of when a waiver could be found.)

Petitioner has ignored the opinion of the Ninth Circuit on the issue of a waiver. The attack on the Ninth Circuit is based not on the opinion, but on the petitioner's failure to read the opinion. Indeed, the petition states:

> The Ninth Circuit's decision was not based on the particular facts of the case, but rather was based on the principle that whenever *any* employer obtains a *Boys Markets* injunction, the right to seek damages in court for the Union's breach of the collective bargaining agreement is extinguished. Petition at 14. (Emphasis in original.)

Petitioner does not cite any part of the opinion to support this conclusion. Apparently the petitioner believes that an employer should be able to invoke federal court jurisdiction on the basis that a dispute is arbitrable and then go directly to trial without exhausting arbitrable remedies. The Ninth Circuit refused to allow the employer's claim for damages where the employer did not even attempt to arbitrate, but went directly to trial. *See* App. A-16, A-17. The proper conclusion to draw from the opinion below would be that when jurisdiction is sought because a dispute is arbitrable, an order to arbitrate should be issued when an injunction is granted.

Petitioner seeks jurisdiction of this Court because of the "absolute" nature of the rule enunciated by the Ninth Circuit. Petition at 14, 15. Petitioner does not cite any portion of the Ninth Circuit's opinion to support the argument and conclusion that an absolute rule enunciated. Respondent submits that the Ninth Circuit did not enunciate any absolute rule, but merely followed the guidelines laid down by this Court in its previous decisions in the labor law field.

II. THE ISSUES IN THIS CASE HAVE BEEN DECIDED CORRECTLY BY THE NINTH CIRCUIT AS IT HAS FOLLOWED PRIOR DECISIONS OF THIS COURT.

An analysis of the court's opinion reveals that the Ninth Circuit was correct in its application of this Court's prior labor law decisions. The court below was faced with the question of whether an employer should be foreclosed from pursuing its action for damages before the employer exhausts the contractual grievance and arbitration procedure mandated by the collective bargaining agreement. App. A-11.

The Ninth Circuit recognized that this Court has addressed the exhaustion question several times previously. At the onset of the court's analysis the Ninth Circuit held:

> Section 301 of the LMRA, 29 U.S.C. § 185, confers jurisdiction on the district court over suits by or against labor organizations to enforce the terms of a collective bargaining agreement. However, where the collective bargaining agreement provides for mandatory arbitration of some or all of the issues in the dispute, exhaustion of contractual remedies is normally required. See *Republic Steel v. Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L.Ed.2d 583 (1965). Doubts as to whether the dispute is arbitrable should be resolved in favor of arbitrability. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Bulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 636 U.S. 593, 80 S. Ct. 1358, 4 L.Ed.2d 1425 (1960) (*Steelworkers trilogy*)

App. A-11, A-12. The employer in this case invoked jurisdiction on the basis the dispute was subject to arbitration. *See* App. A-16. The Ninth Circuit followed the mandate of the *Steelworkers trilogy* and resolved the doubt as to arbitration in favor of arbitration.

Petitioner now seeks certiorari on its assertion that the Ninth Circuit erroneously applied *Boys Markets* and *Republic Steel*.

Petition at 13. However, as discussed below, the petitioner has cited no cases that supports its proposition that there is a conflict between the circuits that requires a reversal by this Court. Indeed, other than one citation to dicta in a footnote, petitioner does not even cite any other portion of the opinion to support its argument that the appellate court was in error.

The Ninth Circuit cited *Republic Steel* for the proposition that exhaustion of contractual remedies is normally required. *See* App. A-11. This Court has recognized the need for grievance and arbitration procedures. In *Republic Steel* this Court held that "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stablizing the common law of the plant." *Republic Steel*, 379 U.S. at 653. The Ninth Circuit refused to allow the employer to proceed on its damage action without first exhausting its arbitral remedies. *See* App. A-17. The Ninth Circuit did not hold that the employers' damage action was extinguished.

This Court has already "cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 243 (1970). The Ninth Circuit guarded against the usurping of the arbitrator's functions by reversing the district court and remanding the case for stay or dismissal pending arbitration. *See* App. A-20.

In the instant case an alleged wildcat strike was enjoined over a grievance in which both parties were bound to arbitrate. An injunction was issued without any order to arbitrate. *See* App. A-16. In *Boys Markets* this Court held:

> When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike.

Boys Markets, 398 U.S. at 1594. In the present case there was no order to arbitrate. *See* App. A-16. No testimony was taken and no findings were made on the issue of arbitrability. App. A-18. The opinion of the Ninth Circuit follows this Court's holding in *Boys Markets*. Therefore, the decision below should be affirmed.

In a very similar case, *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers*, 370 U.S. 254 (1962), this Court held:

> If the union did strike in violation of the contract, the company is entitled to its damages; by staying this action, pending arbitration, we have no intention of depriving it of those damages. We simply remit the company to the forum it agreed to use for processing its strike damage claims.

Id. at 266. The Ninth Circuit did not deprive the employer of any damage remedy in this case; it simply remanded the case to the district court for stay or dismissal pending arbitration. App. A-20.

The case at hand and *Drake Bakeries* have many similarities. In both cases an employer sought damages for breach of a no-strike clause alleging that the union instigated and encouraged its members to strike or not to report for work. *Drake Bakeries* at 258; App. A-8. Both cases involved collective bargaining agreements that had provisions insulating the union from damages for strikes which the union did not authorize. *Drake Bakeries*, 370 U.S. at 259; App. at B-2, 3. In this case there remains several questions to be answered by an arbitrator.

Prior arbitration in this case did not address any question concerning the union's duty to force its members into taking a job with an employer for which the individual members did not want to work. As the Ninth Circuit stated:

> (T)he question remains whether their refusal to accept a job constituted a work stoppage and, if so, whether the Union initiated or condoned the work stoppage in 1978. There is also a question as to the scope of the Union's

> duty under the contract to combat a wildcat strike if one, in fact, occurred. The prior arbitration did not address this question. It would have to be arbitrated.

App. A-14. The Ninth Circuit reversal of damages should be affirmed on the basis of this Court's prior decisions in *Drake Bakeries, Boys Markets,* and *Republic Steel.*

Petitioner's legal theory would clearly undermine the federal labor policy favoring arbitration. The employer could use the no-strike/arbitration clauses in a collective bargaining agreement to invoke jurisdiction for an injunction preventing work stoppages, but circumvent the arbitration procedure and sue directly in district court for damages. Arbitration as a forum to resolve labor-management disputes would be eliminated. Parties to a collective bargaining agreement would be in district courts for trial on the merits interpreting the agreement's terms. Petitioner's claims cannot withstand analysis and cannot support a grant of certiorari in this case.

III. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT AND OTHER COURTS OF APPEALS ON THE ISSUES OF EXHAUSTION OF ARBITRAL REMEDIES AND WAIVER.

As a further ground for seeking certiorari, petitioner claims that the Court must resolve an alleged conflict between the decision in this case and the nine decisions of other courts of appeals in the petition. Petitioner has represented these cases as creating a conflict by misrepresenting the Ninth Circuit in the following manner:

> The Ninth Circuit's decision in this case creates a conflict among the circuit court of appeals because the Ninth Circuit stands alone in requiring the parties to a collective bargaining agreement before filing suit under 29 U.S.C. § 185. No other court of appeals has interpreted *Republic Steel* as requiring such a result. On the contrary, nearly all other courts of appeals and all those which have considered the issue have held that the contract right to arbitration may be waived. Petition at 16, 17.

A study of the cases cited by petitioner reveals there is no conflict with the decision below.

Petitioner has not cited any case that interprets *Republic Steel* in conflict with the Ninth Circuit's interpretation. In fact, petitioner has not even cited a case interpreting *Republic Steel.* Not a single case cited by petitioner supports its proposition that there is a conflict between the Ninth Circuit and other courts of appeals.

Three of the nine cases cited by petitioner were decided before this Court decided *Republic Steel. See Radiator Specialty Co. v. Cannon Mills,* 97 F.2d 318 (4th Cir. 1938); *American Locomotive Co. v. Gyro Process Co.,* 185 F.2d 316 (6th Cir. 1950); *E.T. Simonds Constr. Co. v. Local 1330, Int. Hod Carriers,* 315 F.2d 291 (7th Cir. 1963). It is difficult to imagine how petitioner believes these cases to be in conflict with the Ninth Circuit's interpretation of *Republic Steel.* These three cases do show the frivolous nature of the petition for certiorari.

The alleged conflict between the Ninth Circuit and other courts of appeals is further eroded by the fact that the Ninth Circuit has recognized that in some cases the right to arbitration can be waived. In *Shinto Shipping Co. v. Fibrex & Shiping Co.,* 572 F.2d 1328, (9th Cir. 1978), the Ninth Circuit held that it was clear that a party could waive its right to arbitration. *Id.* at 1330. In support of its proposition in *Shinto* the Ninth Circuit cited two cases: *Demsey & Assoc., Inc. v. S.S. Sea Star,* 461 F.2d 1009 (2d Cir. 1972) and *Cornell & Co. v. Barber & Ross Co.,* 360 F.2d 512 (D.C. Cir. 1966). *Shinto* at 1330. *Demsey* and *Cornell* were both cited by petitioner as examples of the conflict with the Ninth Circuit. *See* Petition at 8, 9, 16, 17. There can be no conflict when the decisions petitioner uses to show a "conflict" actually square with the Ninth Circuit on the issue of waiver.

Petitioner also cited *Morales Rivera v. Sea Land of Puerto Rico, Inc.,* 418 F.2d 725 (1st Cir. 1969), in support of the alleged conflict. Petition at 9, 16. In *Morales Rivera* plaintiff employees sued defendant employer for back wages. The employer removed to the district court on the ground of diversity and the

action was dismissed for failure to prosecute. Nine months later plaintiffs sought to have the dismissal with prejudice vacated, claiming lack of jurisdiction because a collective bargaining agreement had an arbitration clause. The *Morales* court found a waiver because the plaintiffs had originally brought the action. The instant case is easily distinguishable as it involves an employer who sought federal court jurisdiction on the ground the dispute was arbitrable and then claimed a waiver of arbitration.

Burton-Dixie Corp. v. Timothy McCarthy Const. Co., 436 F.2d 405 (5th Cir. 1971), also fails to support petitioner's position that there is a conflict between the courts of appeals on the issue of waiver. The Fifth Circuit found a waiver in *Burton-Dixie*, but in so doing, the court held that the question of what constitutes a waiver depends on the facts of each case. *Id.* at 408. The Ninth Circuit held that the facts of this case did not justify a waiver. *See* App. A-14.

Another case petitioner cited to influence this Court into believing that there is a conflict was *Reid Burton Constr., Inc. v. Carpenter District Council*, 614 F.2d 698 (10th Cir. 1978); *cert. denied*, 449 U.S. 824 (1980). The Ninth Circuit adopted "the limited exception to arbitrability fashioned in *Reid Burton*". *Cal. Trucking Ass'n v. Teamsters, Local 70*, 679 F.2d 1275, 1283 (9th Cir. 1981). The Ninth Circuit cited *Cal Trucking* as dicta when a waiver of arbitration could be found. *See* App. A-23, A-24 n.3. Petitioner is misleading this Court in arguing for certiorari by its omission of complete reference to footnote 3 in both the statement of the case and the argument. *See* Petition at 4, 7.

Another case cited by petitioner also fails to show a conflict. In *Local 198, United Rubber, Cork, Linoleum and Plastic Workers v. Interco, Inc.*, 415 F.2d 1208 (8th Cir. 1969), the union brought action to compel arbitration and the employer claimed the union had waived its right to arbitration. The Eighth Circuit found for the union and affirmed the order of arbitration. The court there held:

> Waiver is an intentional relinquishment of a known right. There is no substantial evidence to support a finding that the union waived any right it possessed to arbitrate the issues here pertinent. Likewise, substantial evidence is wanting to support the essential elements of estoppel.

Id. at 1211. The Ninth Circuit and the Eighth Circuit are in agreement as to what constitutes waiver of arbitration. The Ninth Circuit in the case below, like the Eighth Circuit in *Local 198* found that the employer was estopped to argue the union had waived its right to arbitrate. *See* App. at A-16. In *Local 198* the court found substantial evidence wanting to support the employer's estoppel theory. *Local 198* at 1211.

Petitioner's contention that the decision below is in conflict with other courts of appeals is incorrect. The claim does not withstand analysis and cannot support a grant of certiorari in this case. The framework of the decision below is consistent with other courts of appeals and, as demonstrated above, follows directly from the precedents established by this Court.

CONCLUSION

The Ninth Circuit properly decided this case and did so guided by the previous decisions of this Court. Its decision follows the federal labor policy of encouraging peaceful settlement of labor disputes. The decision should stand as rendered and the petition for a writ of certiorari should be denied.

Respectfully submitted,

M. GREGORY OCZKUS
Counsel for Respondent IBEW #1547

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GEORGE ALLEN McGRATH
(Counsel of Record)
STEPHEN CRANDALL HILLARD
AND MARY LEE POTEET
601 WEST 5TH AVENUE
SUITE 930
ANCHORAGE, ALASKA 99501
(907) 277-4564

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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE ALLEN McGRATH
COUNSEL OF RECORD
STEPHEN CRANDALL HILLARD
AND MARY LEE POTEET
601 WEST 5TH AVENUE
SUITE 930
ANCHORAGE, ALASKA 99501
(907) 277-4564

I. THE UNION HAS FAILED TO EFFECTIVELY REBUT HARDLINE'S ARGUMENT THAT THE NINTH CIRCUIT SIGNIFICANTLY DISTORTED THE HOLDING OF REPUBLIC STEEL, AND THAT SUCH DISTORTION WILL HAVE FAR-REACHING CONSEQUENCES UNLESS CORRECTED BY THIS COURT.

The union does not even attempt to dispute Hardline's point that Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), repeatedly cited by the Ninth Circuit in its opinion in this case, has no application whatsoever to this case. Republic Steel dealt with the duty of an individual union member, and not an employer such as Hardline, to use the contractual grievance procedure agreed upon by its union. Since Republic Steel is inapplicable, it does not support the union's argument that Hardline must exhaust

its contractual remedies before seeking damages under 29 U.S.C. § 185, and the union has failed to cite any authority which does support that proposition. The union has also failed to address Hardline's point that the notion that the employer must initiate arbitration, even if not requested to arbitrate, is fundamentally inconsistent with the doctrine that the union can waive its right to arbitration.*

The union compares the present case to Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,

*The union's citation to that portion of the decision in which the Ninth Circuit acknowledged that the right to arbitration may be waived only underscores the Ninth Circuit's error in this case. In California Trucking Ass'n v. Brotherhood of Teamsters, 679 F.2d 1275 (9th Cir. 1981), cited in this opinion, the court held that the union waived its right to arbitration when it failed to timely raise the issue. The fact that the Ninth Circuit did not find a waiver in this case, where the union never raised the issue of arbitration, clearly demonstrates the Ninth Circuit's inconsistency and error.

370 U.S. 254 (1962), in which this court granted the union's motion for stay of the employer's court action for damages pending arbitration of the dispute. However, the critical difference between this case and Drake Bakeries is that here the union never requested arbitration. Drake Bakeries supports Hardline's position because it makes clear that if the union does not timely request arbitration, its right to arbitration is waived.

The union argues that Hardline's petition for certiorari should not be granted because the Ninth Circuit did not rely upon Republic Steel in dismissing Headline's suit. However, it is clear that the Ninth Circuit relied heavily upon Republic Steel. See Petition App. A-11, 14, 23. Accordingly, this court should grant Hardline's petition for certiorari in order to prevent the Ninth Circuit's erroneous distortion of Republic Steel from

having the far-reaching precedential effect which it otherwise would have.

II. THE UNION HAS FAILED TO EFFECTIVELY REBUT HARDLINE'S ARGUMENT THAT THE NINTH CIRCUIT SIGNIFICANTLY DISTORTED THE HOLDING OF BOYS MARKETS, AND THAT SUCH DISTORTION WILL HAVE FAR-REACHING CONSEQUENCES UNLESS CORRECTED BY THIS COURT.

The union has not disputed Hardline's basic contention, which is supported by ample authority at pages 10-12 of Hardline's petition, that an employer need only arbitrate an arbitrable dispute if requested to do so.* It is undisputed that the union never requested arbitration of

*The union's argument that arbitration is the preferred method of dispute resolution is simply not relevant to a case such as this one where neither party ever requested arbitration.

the dispute in this case, and therefore, Hardline was not obligated to arbitrate the matter.

The fact that an employer may have earlier obtained a Boys Markets injunction has no effect on this principle and the union has failed to cite any authority to the contrary. Boys Markets, Inc. v. Retail Clerks Union, Local 7710, 398 U.S. 235 (1970) merely holds that prerequisites of a proper injunction are that the dispute is arbitrable and that the employer is willing to arbitrate the matter. There is no requirement that the dispute actually be arbitrated subsequent to the issuance of the injunction.

The union claims that this court should not grant Hardline's petition for certiorari because the Ninth Circuit's decision does not establish a far-reaching, absolute rule to the effect that any employer who obtains a Boys Markets

injunction must exhaust the arbitration procedure provided for in the collective bargaining agreement before seeking damages in court under 29 U.S.C. § 185. Opposition Brief at 6. However, that is precisely the rule enunciated by the Ninth Circuit, and for the first time by any court, in the present case.

In dismissing Hardline's suit for damages, the Ninth Circuit expressly stated its rationale as follows: "Hardline sought and obtained an [Boys Markets] injunction against the Union's alleged strike activity on the basis the dispute was arbitrable." Petition App. A-15. Therefore, the decision clearly stands for the proposition that any employer who obtains a Boys Markets injunction must exhaust remedies under the collective bargaining agreement before seeking damages under 29 U.S.C. § 185. Although the union denies that the result in Hardline will be applied to other

employers obtaining Boys Markets injunctions, the language and reasoning of the opinion are to the contrary and the union can cite no reason why the decision would not have a far-reaching and precedential effect on all such employers.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
George Allen McGrath
Counsel of Record
Stephen Crandall Hillard
Mary Lee Poteet
601 West 5th Avenue
Suite 930
Anchorage, Alaska 99501
Counsel for Petitioner

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